

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RICHARD A. SMITH,

Plaintiff,

Case No. 16-cv-13796

v

Honorable Thomas L. Ludington
Magistrate Judge Patricia T. Morris

PATRICK J. MCGRAW, et al.,

Defendants.

**ORDER ADOPTING REPORT AND RECOMMENDATION, DISMISSING
COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION, AND DENYING
MOTION TO DISMISS AND MOTION TO STRIKE AS MOOT**

On October 25, 2016 Plaintiff Richard A. Smith initiated this *pro se* action against Defendants Patrick J. McGraw, Barbara A. Kilmaszewski, and Sherrhowda Lynn Brown. ECF No. 1. Plaintiff alleges that Defendants violated his constitutional rights under the First, Sixth, Eight, and Fourteenth Amendment by making false statements to authorities in connection to a child custody investigation. *Id.* Specifically, Plaintiff alleges that Ms. Brown falsely informed Child Protective Services and police that Plaintiff was teaching his son how to make a bomb. As a result of Defendant Brown's actions and the actions of her attorney, Ms. Kilmaszewski, Plaintiff alleges that Judge McGraw issued meritless personal protective orders. *Id.* The matter was referred to Magistrate Judge Patricia T. Morris for general case management. *See* ECF No. 6.

On November 15, 2016 Defendant Kilmaszewski filed a motion to dismiss, arguing that Plaintiff had failed to state a claim against her for a violation of 42 U.S.C. § 1983 because Plaintiff had not pled facts sufficient to establish that Defendant Kilmaszewski was acting under color of state law at the time of the relevant events. *See* ECF No. 7. On November 17, 2016

Defendant McGraw filed a motion to strike Plaintiff's complaint for violating Federal Rule of Civil Procedure 11(a). *See* ECF No. 10. In the alternative, Defendant McGraw moved for a more definite statement under Rule 12(e).

The magistrate judge then issued a report and recommendation on November 30, 2016 recommending that Plaintiff's complaint be dismissed for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. *See* ECF No. 11. Under that doctrine "[f]ederal district courts do not stand as appellate courts for decisions of state courts." *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 (1983). Because Plaintiff's alleged injuries arose out of the decisions of a state court, the magistrate judge reasoned that his claims are not reviewable. In the alternative, the magistrate judge recommended that the matter be dismissed for failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). The magistrate judge reasoned that Defendant McGraw is shielded by judicial immunity. The magistrate judge also noted that neither Defendant Kilmaszewski nor Defendant Brown is a state actor, and Plaintiff does not allege that either was acting under color of state law.

Although the magistrate judge's report explicitly states that the parties to this action could object to and seek review of the recommendation within fourteen days of service of the report, neither Plaintiff nor Defendants filed any objections. The election not to file objections to the Magistrate Judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation waives any further right to appeal.

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation, ECF No. 11, is **ADOPTED**.

It is further **ORDERED** that Plaintiff's complaint, ECF No. 1, is **DISMISSED** for lack of subject matter jurisdiction.

It is further **ORDERED** that Defendant Kilmaszewski's motion to dismiss, ECF No. 7 and Defendant McGraw's motion to strike, ECF No. 10, are **DENIED as moot**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: December 21, 2016

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 21, 2016.

s/Michael A. Sian
MICHAEL A. SIAN, Case Manager